1986

The State of Utah v. George Edward Christensen : Response to Petition for Rehearing

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	20641
Plaintiff-Respondent,	:	Case No. 20641
-v-	:	
GEORGE EDWARD CHRISTENSEN,	:	Priority No. 2
Defendant-Appellant.	:	

REPLY TO PETITION FOR REHEARING

APPEAL FROM CONVICTION OF MURDER IN THE SECOND DEGREE, A FIRST-DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-5-203(1) (1953 AS AMENDED), IN THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE ERNEST F. BALDWIN, JUDGE, PRESIDING.

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1. Whether this Court must provide the parties with notice when it consolidates two appeals upon its own motion.

2. Whether defendant was denied the opportunity to file a reply brief pursuant to the Utah Rules of Appellate Procedure.

3. Whether the jury's verdicts were inconsistent and, if so, whether consistent verdicts in a criminal case are required.

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
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-v-	:	
GEORGE EDWARD CHRISTENSEN,	:	Priority No. 2
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STATEMENT OF THE CASE

Defendant, George Edward Christensen, was charged with murder in the second degree, a first degree felony, in violation of Utah Code Ann. § 76-5-203(1) (1953 as amended).

Defendant was convicted of murder in the second degree, in a jury trial held from December 12 through December 20, 1984, in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Ernest F. Baldwin, Judge, presiding. Defendant was sentenced by Judge Baldwin on February 8, 1985 to five years to life in the Utah State Prison to run concurrently with the sentence defendant was previously serving.

This is a response to appellant's petition for rehearing of a per curiam opinion filed May 1, 1986.

STATEMENT OF FACTS

The State agrees with the fact statement set forth in State v. Stewart, 33 Utah Adv. Rep. 15 (filed May 1, 1986) (a copy of the entire opinion is contained in Appendix A).

In addition, the following facts are pertinent to this petition for rehearing. Respondent's brief was filed April 24, 1986. This Court, upon its own motion, consolidated the appeals of co-defendants Stewart and Christensen because the facts and issues were the same. This Court then filed a per curiam opinion on May 1, 1986 affirming the convictions of both defendants.

SUMMARY OF ARGUMENTS

Consolidation of separate appeals by this Court does not require notice to the parties. The Court filed its per curiam opinion before defendant had a sufficient opportunity to file a reply brief pursuant to Rule 26(a) of the Utah Rules of Appellate Procedure (1985). The jury's verdicts finding defendant guilty and two codefendants not guilty were not inconsistent. Assuming, arguendo, that the verdicts were inconsistent, rational consistency of verdicts between codefendants is not required.

ARGUMENT

POINT I

NOTICE TO THE PARTIES OF THIS COURT'S CONSOLIDATION OF SEPARATE APPEALS IS NOT REQUIRED.

Defendant contends that his due process rights were violated because the Court did not notify him that his appeal was consolidated with the appeal of a codefendant, Dail Ray Stewart. However, defendant admits that this Court may consolidate separate appeals upon its own motion pursuant to Rule 3(b), Utah Rules of Appellate Procedure (1985). Defendant claims that motions for procedural orders can be summarily acted upon by the

Court only if the motion would not substantially affect the rights of the parties or the ultimate disposition of the appeal. However, the only issue raised by defendant was whether there was sufficient evidence to convict each defendant of second degree murder. Therefore, consolidation of the separate appeals did not substantially affect defendant's rights nor the ultimate disposition of his appeal.

POINT II

THIS COURT VIOLATED ITS OWN RULES OF APPELLATE PROCEDURE BY NOT ALLOWING DEFENDANT THE OPPORTUNITY TO FILE A REPLY BRIEF PURSUANT TO RULE 26(a).

Respondent's brief was filed on April 24, 1986 and the Court issued a per curiam decision on May 1, 1986. Utah Rules of Appellate Procedure, Rule 26(a) provides that appellant has 30 days to file a reply brief. Therefore, defendant was effectively denied the opportunity to file a reply brief in accordance with the Utah Rules of Appellate Procedure. Although defendant's contentions which may have been raised in a reply brief are apparently contained in Point II of his petition for rehearing, he should be allotted the appropriate time to file a reply brief, or indicate to the Court whether he intends to rely on arguments in Point II of his Petition for Rehearing as his Reply.

POINT III

THE JURY'S VERDICT FINDING THE DEFENDANT GUILTY AND TWO CODEFENDANTS NOT GUILTY WERE NOT INCONSISTENT, BUT ASSUMING ARGUENDO THAT THEY WERE, CONSISTENCY BETWEEN CRIMINAL CODEFENDANTS IS NOT REQUIRED.

Defendant contends that because he was found guilty and codefendant Dominguez, allegedly as culpable, was found not guilty, the verdicts were necessarily inconsistent. However, the evidence differed between defendant and his codefendant. Dominquez, although considered a leader of the group which attacked Glen Evert, was only carrying a pool cue or broom handle while Christensen had a knife (R. 1386-89). Defendant was observed after the attack standing over Glen Evert with a blood-stained knife in his hand (R. 761). Also, defendant admitted striking Glen Evert with his knife (R. 2001).

Furthermore, both defendant and codefendant Dominguez testified at trial. The jury had the opportunity to judge the credibiilty of each and weigh their testimony. This Court does not have that same opportunity and should therefore allow great deference to the jury's verdict. State v. Howell, 649 P.2d 91, 97 (Utah 1982).

Assuming arguendo that the jury's verdicts were inconsistent, it is well established in most jurisdictions that "criminal verdicts as between two or more defendants tried together need not demonstrate rational consistency."[1] The United

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[1] Annotated 22 A.L.R. 3d 717, 723 (1968). See Also Dunn v. United States, 284 U.S. 390 (1932).

States Supreme Court articulated the rationale behind allowing inconsistent verdicts in Dunn v. United States. In that case two defendants were tried together and one was convicted while the other was acquitted. The Court stated that if separate indictments were presented, each defendant was tried separately, and the same evidence was offered in each case, an acquittal of one could not be pleaded as res judicata of the other. 284 U.S. at 393. The Court further stated, "[t]hat the verdict may have been result of compromise, or of a mistake on the part of the jury, is possible. But verdicts cannot be upset by speculation or inquiry into such matters." Id. at 394.

Other courts have followed the rationale in Dunn and held that although the evidence against two or more defendants was exactly the same or nearly identical, consistency of verdicts is not required. See e.g. State v. Rogers, 537 P.2d 222 (Kan. 1975); Newell v. State, 308 So.2d 68 (Miss. 1975); State v. Tovar, 627 P.2d 702 (Ariz. 1980).

Therefore, consistency of verdicts is not required in the great majority of jurisdictions and this Court should deny defendant's petition for rehearing on this issue.

CONCLUSION

Based on the foregoing, this Court should set aside its per curiam opinion of May 1, 1986 and accord the defendant the balance of the time period provided by Rule 26(a), Utah Rules of Appellate Procedure, in which to file a reply brief; to wit, 23 days from the date the opinion is set aside. Defendant should indicate to the Court and opposing counsel within that 23-day-

period whether he intends to rely on Point II of his petition for rehearing in lieu of filing a separate reply brief.

While respondent concedes this defendant was denied his right to file a reply brief, justifying setting aside the Court's opinion for the narrow purpose of according him that right, respondent clearly does not agree that the legal analysis and conclusions expressed in this Court's opinion of May 1, 1986 were incorrect. The State reaffirms the position taken in Respondent's opening brief that defendant's conviction should be affirmed.

DATED this 5th day of June, 1986.

DAVID L. WILKINSON
Attorney General

Earl F. Dorius

EARL F. DORIUS
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that I mailed four true and exact copies of the foregoing Reply to Petition for Rehearing, postage prepaid, to Andrew A. Valdez, attorney for appellant, Salt Lake Legal Defender Association, 333 South Second East, Salt Lake City, Utah 84111, this 5th day of June, 1986.

Earl F. Dorius

ADDENDUM

33 Utah Adv. Rep. 15

IN THE SUPREME COURT
OF THE STATE OF UTAH

Plaintiff and Respondent,
v.
Dell Ray STEWART,
Defendant and Appellant.

No. 20639

State of Utah,
Plaintiff and Respondent,
v.
George Edward Christensen,
Defendant and Appellant.

No. 20641

FILED: May 1, 1986

THIRD DISTRICT
Hon. Ernest F. Baldwin

ATTORNEYS:

Bradley P. Rich for Defendant and Appellant.

David L. Wilkinson for Plaintiff and Respondent.

Andrew A. Valdez for Defendant and Appellant.

David L. Wilkinson for Plaintiff and Respondent.

PER CURIAM:

Appellants were charged with second degree homicide in the stabbing death of a fellow state prison inmate. U.C.A., 1953, §76-5-203 (Supp. 1985). Appellants were tried together with inmates Frank Dominquez and Tommy Coleman, who were also charged with the killing. Dominquez and Coleman were acquitted, but appellants were convicted. Separate appeals were filed in this Court, but because the facts and issues on appeal are the same, we consolidate the appeals and affirm appellants' convictions.

The only issue raised by appellants here is that the evidence is insufficient to sustain a verdict of second degree murder. Specifically, appellants argue that the evidence does not show that their participation in the beating and stabbing of inmate Glen Evert was any greater than the involvement of the acquitted defendants, Coleman and Dominquez. On review, we consider the lengthy testimony and evidence in a light most favorable to the jury's verdict, *State v. Corlick*, Utah, 605 P.2d 761 (1979), and assume that the jury believed those portions of the evidence supporting the verdict. *State v. Gibson*, Utah, 565 P.2d 783 (1977).

On the evening of February 14, 1984, at the Utah State Prison, inmate Glen Evert was beaten and fatally stabbed by a mob of inmates led by defendants Stewart, Christensen, Dominquez, and Coleman. Dominquez and Stewart were considered spokesmen of a gang of inmates with which Christensen and Coleman were also associated. Earlier that day, Evert accused Stewart of involvement in recent thefts from Evert's dormitory and knocked him down in a fist fight. Having received a black eye and a swollen lip in the altercation, Stewart threatened to kill Evert. The same accusation was made by Evert against Dominquez, also resulting in a fight with similar results and threats.

Later that evening, defendants, with a group of fifteen to twenty other inmates, confronted Evert in his dormitory. The dormitory residents testified that several of the intruders, including defendants, carried knives or other weapons. Defendants wounded Evert and chased him out of the building. Evert ran through other prison buildings and onto the outside catwalks, where he was finally tackled, beaten, and stabbed. Inmates who observed nearby described the stabbing, flailing, and hacking motions by Stewart, Christensen, and others into Evert's body. Evert was able only to stagger to a nearby prison supervisor's office, where he died of the multiple stab wounds. The medical examiner testified that one stab wound which penetrated the sternum and entered the heart could alone have caused Evert's death.

We reject appellants' argument that the verdicts, wherein they were convicted but Dominquez and Coleman were acquitted, are so obviously inconsistent that they demonstrate an insufficiency of the evidence. A participant who encourages or assists others in a crime may be found guilty when the evidence supports his conviction. U.C.A., 1953, §76-2-202 (1978 ed.). The question on review is simply whether there is sufficient evidence to support the guilty verdicts. The inquiry then is whether the verdicts against Stewart and Christensen are supported by substantial evidence.[1] We conclude that they are.

Although witnesses identified all four defendants as leading aggressors in the attack, Stewart and Christensen were identified as possessing the knives which inflicted numerous stab wounds. A witness who encountered Evert and the mob in a stairwell testified that Christensen, with a bloody knife in his hand, looked over the wounded Evert from the top of the stairwell. In his defense, Christensen admitted that he had taken a machete knife with him to the fight and had stabbed Evert in the back. But Christensen claimed that he acted only in defense of

another inmate being attacked by Evert.

Other testimony showed that Stewart carried the only knife capable of causing the one stab wound described as fatal by the medical examiner. Stewart did not testify in his own defense. But, during the prison investigation after the stabbing, Stewart denied any involvement, although he admitted he had observed the fight in progress. He claimed he had earlier received his black eye and swollen lip in a basketball game. This alibi was controverted by the testimony of the other defendants.

Determining the facts from the evidence is the sole and exclusive province of the jury. *State v. Gorlick, supra; State v. Rosenbaum,* 22 Utah 2d 159, 449 P.2d 999 (1969). The jury was not obligated to accept the versions advanced by defendants, but was able to draw its own inferences and conclusions as to their conduct and credibility. The acquittal of Coleman and Dominquez does not necessarily require appellants' acquittal. "That the verdict may have been a result of compromise, or of a mistake on the part of the jury is possible. But verdicts cannot be upset by speculation or inquiry into such matters." *Dunn v. United States,* 284 U.S. 390, 394 (1932).

Appellants suggest that the testimony of other inmates was inherently incredible because the prisoners testified only to obtain parole or other special considerations from their incarcerator. Defendants argued this point to the jury, which evaluated the credibility of the inmate witnesses, as well as any bias and prejudice. It is elementary that the fact finder may accept all, part, or none of a witness's testimony.[2] It may believe one witness as against many. *Renfro v. State,* Okla. Cr., 607 P.2d 703 (1980). Even accepting appellants' argument of inconsistencies in the inmates' testimony, we certainly cannot say that the testimony was so improbable that it was inherently unbelievable. *State v. Lovato,* Utah, 702 P.2d 101, 107 (1985); *State v. Middelstadt,* Utah, 579 P.2d 908 (1978).

Circumstantial, as well as direct, evidence that places the defendants as participants at the scene at the time of the killing and places the murder weapons in their possession is sufficient to sustain the guilty verdict.[3] Without more, the eyewitness testimony of observing inmates is sufficient to support the jury's finding. It is clear to this Court that the State's evidence and inferences which can be drawn therefrom are not so inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt as to appellants' guilt.[4]

The second degree homicide convictions of Stewart and Christensen are affirmed.

1. United States v. Powell, ___ U.S. ___, 105 S. Ct. 471, 478 (1984); State v. Cager, 45 Hawaii 478, 370 P.2d 739 (1962).

2. State v. Hewitt, Utah, 689 P.2d 22 (1984); Clegg v. State, Wyo., 655 P.2d 1240 (1982); State v. Cannon, 56 Hawaii 161, 532 P.2d 391 (1975); State v. Cager, 370 P.2d at 743.

3. State v. Paradis, 106 Idaho 117, 676 P.2d 31 (1983), *cert. denied,* 104 S. Ct. 3592 (1984); *compare* State v. Crick, Utah, 675 P.2d 527 (1983), *with* State v. Garcia, Utah, 663 P.2d 60 (1983).

4. State v. Roberterano, Utah, 681 P.2d 1265 (1984); State v. Shabata, Utah, 678 P.2d 785 (1984); State v. Garcia, *supra.*

Cite as
33 Utah Adv. Rep. 16

IN THE SUPREME COURT OF THE STATE OF UTAH

David SINCLAIR,
Plaintiff and Appellant,
v.
Lorraine R. SINCLAIR,
Defendant and Respondent.

No. 20031
FILED: May 2, 1986

FOURTH DISTRICT
Hon. J. Robert Bullock

ATTORNEYS:
Douglas T. Hall for Plaintiff and Appellant.
Craig M. Snyder for Defendant and Respondent.

PER CURIAM:

In this appeal from a divorce decree, plaintiff assails the trial court's award of the decree to defendant on her counterclaim, the award to her of attorney fees in the amount of $1,500, and the division of the marital debt. Plaintiff also appeals from the trial court's dismissal of his contempt motion. We affirm.

A skeletal outline of the facts suffices to frame the issues here pleaded.

I.

Within a few days after he received his United States citizenship, plaintiff filed for divorce and removed himself and the children from the family's home. He told defendant that she had no further rights to the children and placed the children with a babysitter who had caused considerable friction between the